1   UNITED STATES DISTRICT COURT
     SOUTHERN DISTRICT OF NEW YORK
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3   UNITED STATES OF AMERICA,

4   v.   15 Cr. 565 (VEC)

5   KEVIN JOHNSON,

6   Defendant.

7   ------------------------------x

8   New York, N.Y.
                                            April 28, 2016
9   2:45 p.m.

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     Before:
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                      HON. VALERIE E. CAPRONI,
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                                            District Judge
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14   APPEARANCES

15   PREET BHARARA
          United States Attorney for the
16   Southern District of New York
     JASON SWERGOLD
17   Assistant United States Attorney

18   FEDERAL DEFENDERS OF NEW YORK
          Attorneys for Defendant
19   CHRISTOPHER A. FLOOD
     SYLVIE J. LEVINE

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1   (Case called)

2   MR. SWERGOLD: Good afternoon, your Honor, Jason

3   Swergold for the government.

4   THE COURT: Good afternoon.

5   MR. FLOOD: Your Honor, good afternoon, Christopher

6   Flood, Federal Defenders of New York, here with Sylvie Levine

7   from our office and Mr. Kevin Johnson.

8   THE COURT: Good afternoon.

9   Where are we? I think it's time to set a motion

10 schedule.

11   MR. FLOOD: Yes, your Honor. Here is where we are.

12 We have had possession of electronic data and validation

13 studies from the OCME since the afternoon of March 21. The

14 OCME did not enable Mr. Swergold to be able to provide rolling

15 discovery, unfortunately. Since that moment we have provided

16 those materials to our experts and asked them to get back to us

17 as soon as they could. Ms. Levine and I have been burning

18 midnight oil trying to clarify our understanding and sharpen it

19 around this very complicated topic. And here is where we are

20 with regard to the Daubert issue. We firmly believe that there

21 is a latent *Daubert* issue regarding the testing in

22 Mr. Johnson's case, although it's somewhat unripe because we

23 have not actually gotten expert notice from Mr. Swergold

24 because we have not requested it, so we got to go through those

25 sort of specific steps first, I think.

1   THE COURT: Perhaps, but I thought you were going to

2   move to suppress the -- this is DNA, DNA that was allegedly

3   found on the gun.

4   MR. FLOOD: That's right.

5   THE COURT: You are going to suppress it, move to

6   suppress it on the ground that whatever scientific methodology

7   the government used, in your view, is not reliable, does not

8   comply with scientific methods, yadda, yadda, yadda.

9   MR. FLOOD: Specifically any testimony that would be

10 offered would be unreliable. It's not like if you violate the

11 Fourth Amendment. It would be based in *Daubert*, which would be

12 that based on the Rule 702, which is that the expert testimony

13 that would be proffered --

14   THE COURT: I see your point.

15   MR. FLOOD: We can get that taken care of with speed.

16   THE COURT: I can take care of the first part of it

17 very quickly.

18   MR. FLOOD: Like that.

19   THE COURT: Provide your notice.

20   MR. FLOOD: Exactly. Most of this is inferred in this

21 district as taking place, but we just need to know exactly what

22 that testimony will be. And we can logically infer what it

23 will be, but we need to know exactly what it is.

24   It gets a little more complicated from here because we

25 have been working diligently with our experts who, by the way,

1   understand the urgency of this matter, and we have done what we

2   can to communicate to them the Court's expectations about

3   moving this along. But as of right now we do not have

4   formalized reports from our experts. Mind you, we have had

5   possession of five full disks of validation studies, very

6   voluminous, very complicated, some of it practically

7   inscrutable materials for about as long as it took for the OCME

8   to produce it. They have been working through them. And we

9   don't have a complete picture standing here right now of a

10   final understanding of how the OCME's work affected

11   Mr. Johnson's DNA report.

12   However, we do have a preliminary call from more than

13   one expert and this is where it gets complicated. And this

14   comes back to the 702 problem. We have been unable to check

15   the math, if you will.

16   THE COURT: Let me interrupt you for a second,

17   Mr. Flood. I know that you've written me on this before. But

18   the issue is that it's not so much that you are contesting that

19   alleles that match your client were on the gun. It is what are

20   the odds that sort of a very small DNA sample can be reliably

21   associated with a particular person.

22   MR. FLOOD: That is embedded in part of our challenge.

23   But what FST, which is the program that's at issue here, does

24   is not even quite that. It's a new paradigm.

25   Frankly, part of the problem here is, it's inherently

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1   confusing. A likelihood ratio is applied to the underlying DNA

2   profile. Likelihood ratio is inherently different

3   statistically than what we have been used to for well onto

4   three decades now with DNA in the courtroom. We are used to

5   saying, what's the likelihood that this DNA, that someone is

6   excluded or included as a source of this sample. That's not

7   what the likelihood ratio does. And what we have here let's

8   just talk about, there is a strap, a sample from a strap. The

9   sample from the strap, there is a number associated with it.

10   It's 66 million. What's the chance that you are going to go

11   pick somebody in a population and it's a 66 million chance that

12   it's Kevin Johnson. That's not what the 66 million is.

13   The likelihood ratio in this case compares two

14   probabilities or two propositions, excuse me. One proposition

15   is that -- on the top of this ratio. The top of the ratio is

16   called the prosecutors' hypothesis, and that hypothesis is that

17   this DNA profile on the gun includes Kevin Johnson, despite the

18   fact that that profile on the gun only includes, by my

19   calculations, about 72 percent of his DNA alleles, that is,

20   it's missing about 28 percent of his alleles. And on the

21   bottom it's typically referred to as the so-called defendant's

22   hypothesis. We have rejected that title because, by the way,

23   they never asked us what our hypothesis is.

24   THE COURT: I don't think the title is all that

25   important.

1   MR. FLOOD: If we ever get to trial, we would moving

2   in limine not to use that word.

3   THE COURT: That might be granted. But we are a long

4   way from that, apparently.

5   MR. FLOOD: Thank you. That would be some unknown

6   source.

7   THE COURT: That happens to share 72 percent of Kevin

8   Johnson's alleles.

9   MR. FLOOD: Perhaps.

10   THE COURT: All of which is a function of how common

11   are those alleles in the general population.

12   MR. FLOOD: Among other things. And in this case they

13   also included two unknown sources in both above and below. And

14   along with that we have the whole drop in and drop out and a

15   number of other things that we are still trying to understand

16   what goes into FST. They compare those two hypotheses. In

17   that comparison -- by the way, neither of these hypotheses may

18   be true.

19   THE COURT: Depends on how you define the second one.

20   It either is or it isn't his.

21   MR. FLOOD: The point is, both of them are

22   conjectural. It is not that one or the other has a claim to

23   accuracy. It is that both of them are hypotheses. When they

24   run the calculation, based on the internal workings of this

25   program, which is a black box program, not open source, which

1   is for the field a strong recommendation that this software

2   should be open source because there are so many variables that

3   moving one decimal point one way or another could change by

4   orders of magnitude the product at the end. In Kevin Johnson's

5   case it's 66 million favoring the prosecutors' hypothesis.

6   The answer at the end is -- pardon me. I have got to

7   get this one exactly right. The evidence is true, or the

8   evidence is 66 million times more true if the prosecutors'

9   hypothesis than if the defendant's hypothesis. It's a very

10   arcane way of trying to explain this DNA sample.

11   THE COURT: It's not explaining the sample. It's

12   explaining the likelihood that the sample came from your

13   client, right?

14   MR. FLOOD: Not exactly.

15   THE COURT: This isn't a low copy issue, right? You

16   are not saying it wasn't a good sample. The question is

17   whether given the fact that you don't have a full profile, is

18   it more likely that it's associated with Mr. Johnson than it is

19   with someone other than Mr. Johnson?

20   MR. FLOOD: That is one of the fair questions that

21   could be asked of any sample and that is certainly why the

22   government would want to introduce it. But the question is

23   whether the statistic fairly explains this to the jury. And

24   under 702, offering the likelihood of ratio actually explains

25   that question in a way that's clear because that's not exactly

1   what the likelihood ratio answers. It juxtaposes two different

2   hypotheses against each other and compares them, but it doesn't

3   go directly to what your Honor asked because it doesn't say it

4   makes it more likely that it came from Kevin Johnson. Compared

5   to these two hypotheses, the internal workings of which we

6   don't fully understand.

7   THE COURT: When are you going to get to an

8   understanding?

9   MR. FLOOD: We are working towards that diligently.

10   THE COURT: Here is what I'm thinking, Mr. Flood. I'm

11   thinking that I can allow you to continue to work towards it or

12   I can give you a date by which you will understand it and you

13   will make a motion or we will go to trial.

14   MR. FLOOD: We want to do both.

15   THE COURT: I'd love you to do both.

16   MR. FLOOD: Here is where we are at. Because the

17   problem is FST. That's the problem. We need to be able to

18   check their math, your Honor. That's the thing.

19   THE COURT: You are not going to be doing the

20   arithmetic. It's your expert that needs to do it. And experts

21   typically operate against deadlines.

22   MR. FLOOD: That's true. But we have wrangled ours as

23   best as we can. The problem with it is this and it is a

24   confrontation issue, ultimately.

25   THE COURT: You don't have to persuade me that this is

1   important, Mr. Flood. I'm there. I've given you lots of time.

2   I fully appreciate the importance of the issue. It's important

3   from a constitutional confrontation clause perspective, it's

4   important to your client's freedom. The last thing I want is

5   have a jury convict him of possession of a weapon that he

6   actually didn't possess. I agree it's important. But even

7   important things need to come to an end.

8   MR. FLOOD: I understand. And I do not mean to try

9   the Court's patience.

10   THE COURT: You are not trying my patience, not yet.

11   I want to set a schedule. You are telling me how to build a

12   clock and that's lovely. I just want to set a schedule.

13   MR. FLOOD: The reason I'm laying this groundwork is

14   because what I need to ask the Court --

15   THE COURT: You think I am not going to like it.

16   MR. FLOOD: I know you are not going to like it. What

17   we need is to get to the source code of FST because that's

18   where the math lies. That's why open source is the --

19   THE COURT: You need the source code. They are not

20   giving you the source code.

21   MR. FLOOD: Frankly, Mr. Swergold has been

22   forthcoming, but this is the OCME, they are not going to like

23   this either. It's proprietary. They have a copyright for it.

24   THE COURT: It doesn't mean it does not have to be

25   produced. It could be produced under a protective order.

1   MR. FLOOD: And we wouldn't object to that.

2   THE COURT: What's the story?

3   MR. SWERGOLD: Your Honor, up until I walked into the

4 courtroom today, defense has never requested the source code.

5 When I spoke to OCME after receiving the lengthy discovery

6 requests from the defense, one thing that was not in there was

7 the source code, and I had spoken with OCME about it at that

8 point, and they indicated that they do not want to turn over

9 the source code.

10   If the defendant is asking for it, I would at least

11 like an opportunity to go back with the OCME, find out what

12 their position is, and if we need to put in a letter on that

13 position. And I don't want to delay things any further. I

14 would like a schedule, too. We can do that very quickly. We

15 can do it while the rest of the schedule is set with respect to

16 when the defendant is going to file his motion.

17   THE COURT: I don't think I can do that. This is sort

18 of a whole other set of data. What do I know about evaluating

19 source code. It seems to me, the first thing we need to find

20 out is whether we are going to have to litigate whether they

21 will turn it over or they won't; and if they won't turn it

22 over, what's the import of that.

23   Why don't we do this. Check with the OCME. If they

24 want a court order, I'm happy to sign an order. If they want

25 it under a protective order, limited to the defense's experts,

1   that's perfectly reasonable. Do you know who his expert is?

2   MR. SWERGOLD: I don't.

3   THE COURT: You need to tell him. You don't need to

4   tell me. I don't care. You need to tell him so he can tell

5   OCME, tell the medical examiners just in case they have some

6   particular issue with your expert that might figure into

7   whether they are agreeable to this or not. Let me know by next

8   week, next Wednesday, which would be the 3rd or the 4th.

9   MR. FLOOD: I believe it is the 3rd.

10   THE COURT: By the 4th whether they will disclose it

11   or not; and if they will disclose it, when.

12   Is there anything else, Mr. Flood, other than the

13   source code that you feel like you are lacking in order to do

14   your job?

15   MR. FLOOD: No. That is the main issue.

16   THE COURT: If they say no, then I am going to

17   schedule another status conference fairly quickly to talk about

18   where we are going from there. If they say yes, then you also

19   need to tell me in the letter how long it's going to take to do

20   that, prepare an appropriate protective order, get it to me and

21   I'll sign it.

22   I don't think I can do anything else other than

23   exclude time between now and then in the interest of justice so

24   that you can get all the information that you need in order to

25   adequately defend your client. I find that that interest

1   outweighs the public interest and the defense's interest in a

2   speedy trial.

3   Is there anything else?

4   MR. FLOOD: No, your Honor. Thank you.

5   THE COURT: You could have told me you need the source

6   code. That would have worked.

7   MR. FLOOD: Fair enough.

8   MR. SWERGOLD: Nothing from the government.

9   THE COURT: Thank you. I will see you all either

10 shortly or after you get the source code and after you see it.

11 Then you need to write me a letter telling me how long your

12 expert is going to need. Make sure your expert understands

13 that I am getting itchy about this. We need to go.

14   MR. FLOOD: I assure you we are, too.

15   THE COURT: I'm confident your client is.

16   Anything further?

17   MR. SWERGOLD: No, your Honor.

18   THE COURT: Anything further from you, Mr. Flood?

19   MR. FLOOD: No, your Honor.

20   THE COURT: Thank you.

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